

Constitutionalizing Facebook

 verfassungsblog.de/constitutionalizing-facebook/

Maximilian Steinbeis Sa 10 Nov 2018

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Dear Friends of Verfassungsblog,

A few days ago I had a bit of an unsettling experience. I'm in the middle of a negotiation with a legal science publisher about sponsoring Verfassungsblog, and one of the things we're talking about is that I occasionally advertise new releases from that publisher on my Facebook page. To post branded content on a Facebook page you have, according to Facebook's rules, to use a certain tool provided by Facebook. And to get access to this tool, you have to request it from Facebook. It's very easy, all it takes is a mouse click.

That's what I did. Here is Facebook's answer in all its glory:

"Thanks for submitting your application. We've reviewed your account and unfortunately at this time it isn't eligible for access to the branded content tool. It's our policy not to discuss the standards we use in evaluating accounts for access to the branded content tool. This decision doesn't limit your ability to grow and develop your account and followers. Thanks again for taking the time to contact us."

It's our policy not to discuss the standards we use...

Oh, is it now?

Ok, let's see. Facebook regulates. It sets rules, demands their observance and sanctions their non-observance. Facebook grants and denies access: I get this tool or I don't, a distinction is made. My window of access to Facebook itself is one mouse click, I can't explain anything, I can't even ask a question. The request is rejected, and not only the reasons, but also the standard of assessment are not communicated to me. I'll never even know the criteria according to which I get or get not discriminated. And that, in turn, is communicated to me. Quite explicitly. Just so that I don't get that wrong. It's intentional. "It's our policy."

I don't want to dramatize here. But when I got this email from Facebook, I had the feeling for a moment: This is what it must be like to live in an authoritarian state.

Facebook is a gigantic, global public space with currently about 2.3 billion so-called users who produce a gigantic amount of publicity every day. But these users have no share in the public space they create. They're not citizens, they're not stakeholders in a *res publica* when they use Facebook... well: they are users, that's what they are. Users of a technology. Users of a service that Facebook offers them. Their relationship with Facebook is not a public one: Facebook is a private company and they are its customers, but what services Facebook offers and to whom, and to whom not – that's up to them alone. Facebook sets "community standards", but that only means that Facebook reserves the right to withhold its services from people they consider bad for business, and who that will be and how that gets determined and by which procedures and which criteria, in short: how Facebook

justifies itself, that remains undisclosed, and as a matter of course, too. It's private. A matter of *Privatautonomie*, as German civil law likes to call situations where the right to justification doesn't count.

But Facebook is not a private matter. Facebook is a public space. It's a global public space of unprecedented dimensions that is in dire need of constitutionalization.

German constitutional law, and that's one of its features I really love about it, is rather strict about defending the public space. In one of its key decisions back in the 1950s, the Federal Constitutional Court defined freedom of opinion as the "constituent per se" of the liberal democratic order of the state, as "it alone permits that constant intellectual interaction, the conflict of opinion, which is its vital element". In recent years, the FCC has made several increasingly daring inroads into *Privatautonomie* to defend that vital element from drying up in a fenced-in desert of privatized public space. Anyone who creates a public space cannot simply invoke private autonomy and treat the reasons and criteria according to which he decides and differentiates as his private matter for which he mustn't be held accountable by anyone.

I don't think I will simply accept Facebook's "policy not to discuss the standards they use". I cannot *not* use Facebook, much as I'd want to, most of all because I use Facebook as a means of *publication*: A quarter of all readers access Verfassungsblog via Facebook and rely on Facebook to tell them what's going on on Verfassungsblog. So, I'm sorry, but when Facebook makes decisions about me and my accesses, at least I want to know what the criteria are.

So let's see if that stands. I guess I'll need some legal help there. If you would like to support me, please send me an email (ms at verfassungsblog de).

Triple damage

On Verfassungsblog, we have started an [online symposium](#) this week, together with KARIN LOEVY from the NYU School of Law, on "an **Israel** of, for and by the Jewish People": It is about the controversial new law that defines Israel as the nation state exclusively of the Jewish people. [TAMAR HOSTOVSKY BRANDES](#) argues that the law does threefold damage: as a pretext for discrimination, as a violation of the rights of the Arab minority, and as an obstacle to the development of social solidarity in Israel. Further contributions by [KARIN LOEVY](#), HASSAN JABAREEN, ROB HOSWE and others will follow in the coming days.

In **Germany**, and not only there, the UN Migration Pact was one of the big issues this week, not least thanks to the excitement that the AfD is spreading on the occasion of the imminent adoption of the pact in December. [DANA SCHMALZ](#) took a closer look at the motion of the AfD against Germany's accession and finds there not only the "little surprising rejection of migration ..., but also an extremely crude understanding of international law and state sovereignty".

In **Pakistan**, the Supreme Court has ordered the release of Asia Bibi, sentenced to death for alleged blasphemy, and now the judges themselves have fear for their lives. [ADEEL HUSSAIN](#) reports on that appalling chain of events in which all parties, the principal victim

excluded, look awfully bad.

Russia is allegedly considering ending its membership of the European Convention on Human Rights – which would be the first event of that kind since the withdrawal by the Greek dictatorship in 1967. [KANSTANTSIN DZEHTSIAROU](#) explains how this would work and what dilemma the Council of Europe would face in dealing with that decision.

Elsewhere

[STEVE PEERS](#) discusses the approach of the European Court of Human Rights to test new instruments in the case of **Azerbaijan** against the decline of the rule of law and democracy in Europe.

[DANIEL SARMIENTO](#) is pleased with the ECJ's *Bauer* ruling on direct effect of the right to paid leave in the Charter of Fundamental Rights, "probably the most important set of judgments on fundamental rights in a long time".

[MARCO ANTONIO SIMONELLI](#), against the background of the discussion about the Polish "judicial reform", raises the problem of the way in which the judges and Advocates General at the European Court of Justice are elected to their offices.

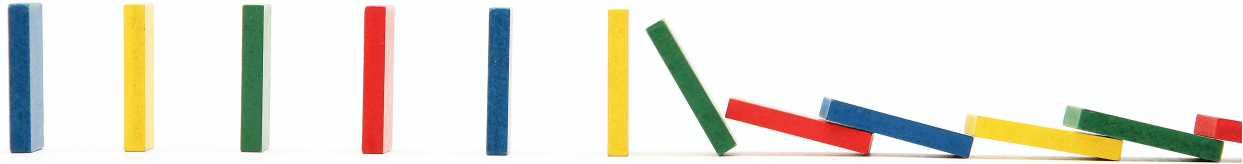
[PHILIP ALLOTT](#) speculates on the legal context of the currently negotiated Brexit Agreement between the **UK** and the EU.

[MICHAEL DORF](#) considers **US** President Trump's appointment of Matthew Whittaker to replace Attorney General Jeff Sessions in the context of the Russian collusion affair to be despicable and possibly criminal, but not necessary unconstitutional. [RYAN GOODMAN](#) believes that Whittaker could paralyze the Mueller investigation with 1000 cuts, even without firing Mueller.

[NEIL BUCHANAN](#), after the Midterm Elections in the **US**, indulges in extreme pessimism at the prospect that Trump could win re-election in 2020.

Workshop
13-14 November 2018
WZB Berlin Social Science Center
wzb.eu/globcon

Constitutional *Resilience*



How Can a Democratic Constitution Survive an Autocratic Majority?

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At last, some big news: This week, our workshop "Constitutional Resilience: How can a Democratic Constitution Survive an Autocratic Majority?" will happen in Berlin. We bring some of the most experienced experts from Hungary and Poland in the hardest hit areas – judges' elections, media supervision, electoral law, opposition rights, etc. – into conversation with corresponding experts from Germany to find out how well the German legal and constitutional order would be armed against assaults like those that have happened in Poland and Hungary. The results will be published in an online symposium here on the blog. Stay tuned!

That's it for now. Have a great week, and all the best,

Max Steinbeis

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